Docket No. 22HF-165423 – Class 9

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Summit Entertainment, LLC, Appellant, v. United States Patent and Trademark Office, Trademark Trial and Appeal Board, Appellee.	**NOTICE OF APPEAL**

Appellant Summit Entertainment, LLC ("Appellant") hereby gives notice of its appeal of the Order of the Trademark Trial and Appeal Board refusing registration of INSURGENT in Class 9, Serial No. 85/813,593, entered on September 15, 2016 (the "Order"). Appellant received the Order on September 15, 2016, which is also the mailing date. A copy of the Order is attached hereto.

Respectfully submitted,

Dated: November 14, 2016

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CERTIFICATE OF MAILING

I hereby certify that the foregoing Notice of Appeal has been served upon the Trademark Trial and Appeal Board by depositing a copy thereof in an envelope addressed to: U.S. Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313-1451, with a duplicate copy served upon the Office of the General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450, on this 14th day of November, 2016. A copy of the foregoing Notice of Appeal has also been filed with the United States Court of Appeals for the Federal Circuit.

LaTrina A. Martin

SMRH:479882779.1

This Opinion is not a
Precedent of the TTAB

Hearing: August 24, 2016 Mailed: September 15, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Summit Entertainment, LLC

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Serial Nos. 85813593 and 85813596[1]

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Jill M. Pietrini of Sheppard Mullin Richter & Hampton LLP,
for Summit Entertainment, LLC.

Mark V. Sparacino, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Shaw, Kuczma and Pologeorgis,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Summit Entertainment, LLC ("Applicant") seeks registration on the Principal Register of the mark INSURGENT, in standard characters, for:

> Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software; downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games; electronic games downloadable via the Internet and mobile devices; video games, namely, video

[1] Because the appeals involve the same issues and nearly identical records, we hereby consolidate them and issue a single opinion for both appeals. Citations to the record are to Serial No. 85813593, unless otherwise noted.

> game cartridges, discs and software, all relating to motion pictures and entertainment concerning motion pictures, in International Class 9; and
>
> Providing online computer games, all relating to motion pictures and entertainment concerning motion pictures, in International Class 41.[2]

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with the identified goods and services, so resembles the mark INSURGENCY, also in standard characters, for "Computer game software for personal computers and home video game consoles," in International Class 9, as to be likely to cause confusion.[3] When the refusals were made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the requests for reconsideration, and the appeals resumed. The cases are fully briefed. We affirm the refusals to register.

Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the goods or services and the similarities between the marks. *See Federated Foods,*

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[2] Application Serial Nos. 85813593 and 85813596 were filed on January 1, 2013, based upon Applicant's allegation of a *bona fide* intention to use the marks in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1(b).

[3] Registration No. 4392625, issued August 27, 2013.

Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). The relevant *du Pont* factors discussed in this case are the similarity of the goods and services, the similarity of the marks, the number and nature of similar marks in use in connection with similar goods and services, consumer sophistication, and the absence of fame of Registrant's mark.

A. The nature and similarity or dissimilarity of the goods and services, the established, likely-to-continue trade channels, and the classes of purchasers.

We first consider the similarity of the goods and services. We base our evaluation on the goods and services as they are identified in the applications and registration. *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is settled that it is not necessary that the respective goods and services be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods and services themselves, but rather whether they would be confused as to the source of the goods and services. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The respective goods and services need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Moreover, if there is likelihood of confusion with respect to any of Applicant's goods in International Class 9, the refusal of registration must be affirmed as to the entire class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Regarding Applicant's goods in International Class 9, the goods are, in part, legally identical to Registrant's goods. That is, Applicant's wording "Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software" would include Registrant's "Computer game software for personal computers and home video game consoles."

Applicant's attempt to limit the scope of its goods by adding the language, "all relating to motion pictures and entertainment concerning motion pictures," does not obviate a finding that the goods are similar. Registrant's goods identify computer games without any limitation as to the subject matter, thus Registrant's computer games could feature motion pictures in some form or manner. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[W]here the likelihood of confusion is asserted with a registered mark, the issue must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.").

Because Applicant's and Registrant's computer game software are legally identical and unrestricted, they are presumed to move in the same channels of trade and to be sold to the same classes of consumers. *See In re Linkvest S.A.,* 24 USPQ2d 1716, 1716 (TTAB 1992) (Because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the goods in the registration and the application move in all channels of trade normal for those goods, and that the goods are available to all classes of purchasers for the listed goods).

Regarding Applicant's services in International Class 41, we find these services are related to Registrant's computer game software as well. The Examining Attorney has made of record ten third-party registrations showing use of the same mark on computer game software as well as in connection with providing online computer games.[4] These registrations show that both Registrant's goods and Applicant's services are of a kind that may emanate from a single source under a single mark. "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). The fact that Applicant intends to provide both computer game software and online games only reinforces the finding that Registrant's goods and Applicant's services are of a type which may emanate from a single source.

Citing TMEP section 1207.01(a)(i), Applicant argues that "[t]he marketplace reality clearly demonstrates that each party's respective goods and services are not

[4] Serial No. 85813596, Office Action of November 8, 2013, pp. 4-33.

'marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source.'"[5] This argument is unpersuasive inasmuch as the cases cited in TMEP section 1207.01(a)(i) dealt with significantly differing goods and services, or were *inter partes* cases decided on more developed records. Further, Applicant has not explained precisely how it will market its identified goods and services so as to avoid their being encountered by the consumers of Registrant's goods. Regardless, we must focus on the goods as identified in the application and cited registration, not on any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).

As with Applicant's goods in International Class 9, the language in Applicant's identification of services, "all relating to motion pictures and entertainment concerning motion pictures," does not impose any meaningful limitation on the marketing of Applicant's services. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1410 (TTAB 2015) ("The [limiting] language does not, in any meaningful way, alter the nature of the goods identified; nor does it represent that the goods will be marketed in any particular, limited way, through any particular, limited trade channels, or to any particular class of customers."). The limitation in Applicant's identification of services simply is not sufficient to establish that prospective consumers would be able to distinguish the source of Applicant's services from Registrant's goods.

[5] Serial No. 85813596, Applicant's Br., p. 19.

For these reasons, we find that the second and third *du Pont* factors weigh in favor of finding a likelihood of confusion as to the goods.

B. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

Next, we consider the *du Pont* factor relating to the similarity of the marks. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark." *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark is the term INSURGENT in standard characters whereas Registrant's mark is the term INSURGENCY, also in standard characters. Both marks are similar in appearance and sound in that they share the same root term, "INSURGEN-". The marks differ only on their endings, "T" versus "CY." This minor difference in endings does little to distinguish them in sound. Additionally, both marks are similar in connotation and commercial impression inasmuch as Applicant's mark is the very definition of Registrant's mark: INSURGENCY is defined as "the state or condition of being insurgent."[6]

Accordingly, we find INSURGENT and INSURGENCY to be similar for purposes of the *du Pont* factor relating to similarity in appearance, sound, connotation and commercial impression. This factor favors a finding of likelihood of confusion.

C. The number and nature of similar marks in use in connection with similar goods and services

Applicant argues that "[t]he Cited Mark is weak and therefore confusion with Applicant's mark is unlikely" because "the Office has a history of registering other INSURGENT and INSURGENT-related marks."[7] In support of its argument that Registrant's mark is weak, Applicant made of record three registrations for marks containing the term "insurgency" or "insurgente" for goods or services unrelated to computer games.[8]

The strength or weakness of a mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods or services. *See Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *du Pont,* 177 USPQ at 567. Evidence of weakness consisting of three third-party registrations for unrelated goods or services is entitled to little weight in determining the strength of Registrant's mark, because such registrations do not establish that consumers of computer games "have become so conditioned by a plethora of such similar marks" that they are able to distinguish among various INSURGENT-formative marks based on small differences. *Palm Bay,* 73 USPQ2d at 1694. This *du Pont* factor is neutral.

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[6] Dictionary.com, Office Action of June 5, 2014, p. 2 (emphasis in original).

[7] Applicant's Br., pp. 9-10.

[8] *Id.*

D. Customer sophistication

Applicant next argues that confusion is unlikely because:

> Registrant's customers are sophisticated video game players who are looking for the specific type of game, namely, a multiplayer tactical first person shooter game with an army combat theme set in Iraq and Afghanistan and in particular, the Iraqi Insurgency. Such customers are quite unlikely to confuse Registrant's video games with Applicant's games associated with the *Divergent* trilogy of motion pictures and books, which focuses on the life of a young girl and which are set in a fictional dystopian Chicago."[9]

It is settled that we must decide likelihood of confusion based on the goods and services as they are identified in the registration and application. *Octocom,* 16 USPQ2d at 1787. As discussed *supra*, there are no meaningful distinctions between the goods in the cited registration and Applicant's identified goods and services. Thus, we cannot assume, as Applicant suggests, that Registrant's goods are limited to a "first person shooter game" and Applicant's goods will be limited to a *Divergent*-based game. Moreover, given the fact that both computer games appear to be directed to a teen-age audience, it is possible that at least some adults, unfamiliar with either product and therefore less sophisticated, may attempt to purchase the games for others. Finally, even if we agree, arguendo, that some higher degree of care is taken

[9] Applicant's Br., p. 24.

in purchasing computer games, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this involving similar marks and identical goods and services. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) ("Human memories even of discriminating purchasers... are not infallible.") (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). We find this factor neutral.

E. Fame

With respect to the fame of the registered mark, Applicant argues that there is no evidence in the record regarding fame and the registered mark is not famous. However, the absence of evidence of fame is not particularly significant in the context of an *ex parte* appeal and is normally treated as neutral when no evidence of fame has been provided. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). Therefore, we find this factor neutral.

F. Conclusion

We have considered all of the arguments and evidence of record, including any not specifically discussed herein, as they pertain to the relevant *du Pont* likelihood of confusion factors. Applicant's marks are highly similar to the cited mark. In addition, the goods and services identified in the subject applications and cited registration are in-part identical or otherwise related such that source confusion is likely to arise. Therefore, we find that Applicant's marks are likely to cause confusion with the mark in cited Registration No. 4392625 when used in association with the goods and services identified in the applications.

Decision: The refusal to register Applicant's marks under Section 2(d) of the Trademark Act is affirmed.